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Draft legislative provisions on interim measures and the form of arbitration agreement—Draft declaration regarding the interpretation of articles II (2) and VII (1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Comments received from Member States and international organizations

Note by the Secretariat*

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* The late submission of the document reflects the date on which the proposals were communicated to the Secretariat.

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II. Comments received from Member States and international organizations

A. Member States

5. United Kingdom

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[18 May 2006]

United Kingdom comments on Article 17 of the Model Law and the future work of UNCITRAL

Following the last meeting of the Working Group in New York, we agreed to send comments on the work of UNCITRAL, in light of its recent project on interim measures and in particular "preliminary orders".

As we noted at the meeting, the United Kingdom has mixed feelings about the completion of this project.

On the one hand, we are of course happy that the Working Group has finally arrived at an agreed draft, which can go forward to the Commission next month, leaving the way clear, at last, for new projects. We would particularly like to congratulate the Chairman and the Secretariat for the tireless work and drafting skills in arriving at a final solution after many difficult sessions.

On the other hand, however, it is the nature of this process itself that gives rise to serious concerns—quite apart from the United Kingdom's reservations on the substance of the new provision (which are now a matter of record, and need not be restated).

On any view, the Working Group's draft on "preliminary orders" has been the subject of extraordinary controversy inside and (more troublingly) outside UNCITRAL. Even ahead of the Commission's consideration, it is already apparent that the new provision will be met with a substantial body of criticism in the international field. This is not to say that it does not also have a body of support, but the key question for us is whether this is really a position in which UNCITRAL should ever find itself. We cannot think of any previous project (short of the Model Law itself) that has had such a difficult gestation, and required so many resources for what, so far as "preliminary orders" are concerned, may be considered a somewhat modest result.

Early on in this particular project, it became manifest that there was no international consensus on "*ex parte*" measures. On the contrary there was—and remains—profound disagreement amongst specialists. The result was inevitable: lengthy debates; difficult Working Group sessions; and a final draft that has the weaknesses of any hard fought compromise.

Our fear, which we have expressed previously, is that the end result may damage UNCITRAL's international standing and future influence. UNCITRAL has a unique reputation worldwide in the development of commercial law. In our view, a key element in its success has been its acceptance as a neutral and expert body, able to express an international consensus, and therefore of significant influence across

diverse cultures and legal traditions. It has been and should be a source of innovation, but within careful bounds. As soon as its work is perceived as controversial, or a vehicle for the interests of a few dominant delegations, it may lose this standing. Equally, as soon as its processes are seen as inefficient in terms of cost and time, it may be that much harder to attract and maintain international participation.

This is all the more regrettable in this case, given that the relatively minor "*ex parte*" element of our work has been allowed to overshadow the rest of the project, and what is certainly a commendable draft on "*inter partes*" measures.

Our suggestion is that this experience be borne in mind in structuring UNCITRAL's future work. In particular, it is our hope that UNCITRAL will continue to innovate, and to push the international consensus as far as it will go. At the same time, however, it is vital that UNCITRAL avoids "trouble spots", internal division, and the expenditure of disproportionate resources where this is avoidable.

The United Kingdom strongly supports the work of UNCITRAL, and will continue to do so. We hope that these few observations will be understood, as they are intended, as constructive comments, and we look forward to working closely with UNCITRAL in its future work in this area.